Supreme Court, U.S.
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In The

Supreme Court of the United States

KAREN SUE CONNER, *Petitioner*,

v.

BARBOUR COUNTY BOARD OF EDUCATION; WILLIAM E. PHILLIPS; CHARLES ZINN; F. EDWARD LARRY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

KAREN SUE CONNER, *Pro Se*
P. O. Box 192
Belington, WV 26250
Phone: (304) 823-2646
Fax : (304) 823-3218

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QUESTION PRESENTED

In applying the res judicata effect of a state court ruling, a federal court should only give that ruling the preclusive effect that the highest court of that state would give it. The West Virginia Supreme Court has ruled that a final ruling on a grievance filed with the West Virginia Education and State Employees Grievance Board does not preclude a civil rights lawsuit based on the same facts as the grievance. Can a federal court rightly dismiss on the basis of res judicata and collateral estoppel a federal Title VII lawsuit because that case was based on some of the same facts that were part of a final ruling on a grievance filed with the West Virginia Education and State Employees Grievance Board?

LIST OF INTERESTED PERSONS AND Rule 29.6 NOTATION

The Parties to the proceeding below were petitioner, Karen Sue Conner and respondent Barbour County Board of Education, William E. Phillips, Charles Zinn, and F. Edward Larry.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Karen Sue Conner, respectfully asks this Court to grant certiorari to review the final judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

On December 13, 1999, the Fourth Circuit Court of Appeals denied petitioners request for Petition for En Banc Rehearing. That denial is attached as Appendix A. On October 6, 1999, the unpublished opinion of the Fourth Circuit Court of Appeals was delivered, denying petitioners request to re-instate her case.

That order is attached as Appendix B. On May 17, 1999, the Federal Northern District Court of West Virginia at Elkins, WV dismissed petitioner's federal employment discrimination claim on principles of res judicata and collateral estoppel, ruling that the case was based on facts that had been the subject of a final ruling on a petition filed with the West Virginia Education and State Employees Grievance Board. That opinion is attached as Appendix C.

JURISDICTION

The Court of Appeals entered its denial of petitioner's request for an En Banc review on December 13, 1999. This Court has jurisdiction under *28 U.S.C. Section 1254(1).*

STATUTORY PROVISION INVOLVED

United States Code

42 U.S.C. Section 2000e-2

(a) Employer practices. It shall be an unlawful employment practice for an employer--- to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3(a)

Title VII's antiretaliation provision which makes it unlawful for an employer to discriminate against any of its employees for filing complaints of discrimination.

STATEMENT

Petitioner, Karen Sue Conner, filed a grievance with the WV Education and State Employees Grievance Board in January 1995 after she was dismissed from employment by the Respondent Board of Education. Petitioner also filed a civil rights complaint with the WV Human Rights Commission and the EEOC feeling that School Laws of WV were different from civil rights laws and also after being advised in two prior grievances that the Grievance Board lacked jurisdiction. See Appendix D footnote 3. *Wright v. Universal Maritime Service Corp. et* al No. 97-889; 525 U.S. (1998)[1] The grievance board issued a decision on September 29, 1995 reinstating Petitioner to her previous job as a bus operator but allowing suspension during time of termination to decision date. The Respondents initiated judicial review by filing an appeal in the Barbour County Circuit Court on October 6, 1995 (post mark date) and then on November 8, 1995 the petitioner's association representative appealed the suspension portion only of the grievance decision since it had been placed in the Courts by the

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[1] *Wright v. Universal Maritime Service Corp.* et al No. 97-889; 525 U.S. (1998) it was observed that in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which held that an employee does not forfeit his right to a judicial forum for claimed discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000 e et. Seq. If "he first pursues his grievance to final arbitration under the nondiscrimination clause of a CBA" because a grievance is designed to vindicate a "contractual right" while a law suit under Title VII asserts "independent statutory right accorded by Congress." Id., at 49-50. At Id., 51 it stated that "there can be no prospective waiver of an employee's rights under Title VII." This court held in *Wright* that "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." 460 U.S., at 708, see also *Lividas v. Bradshaw*, 512 U.S. 107, 125 (1994).

Respondent. Review of a grievance by a Circuit Court is limited to the record of the Grievance Board, and the grievance did not include civil rights claims. On April 19, 1996 the Barbour County Circuit Court reversed the Grievance Board decision allowing Respondent to dismiss the Petitioner. The Petitioner's association representative then appealed the decision of the Barbour County Circuit Court to the WV Supreme Court. This review was limited to the issues and record brought before the Grievance Board, and did not include the civil rights claims. [2] The WV Supreme Court could find no reversible error by the Barbour County Circuit Court.[3] The Petitioner had preserved and placed the civil rights issues with the WV Human Rights Commission and the EEOC.

Petitioner received a right to sue letter from the EEOC and on October 27, 1997 the petitioner filed a timely suit pro se in the Northern District Court at Elkins, WV. (Civil Action No. 2:97CV94). The initial suit on the first EEOC letter was based on sexual harassment, hostile work environment, etc. and the complaint was filed with EEOC in 1994 prior to the petitioner's dismissal from employment. A grievance was filed on these issues (Grievance No. 93-01-154) but it was dismissed in 1994 because the grievance board stated they lacked jurisdiction in these matters and the WV Human Rights Commission

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[2] *Abramson v University of Hawaii* (1979, CA9 Hawaii) 594 F2d 202, noted that discrimination claims were never litigated in the state court and reservation for a subsequent suit in federal court served to protect the policy underlying Title VII.

[3] *Wilson v. WV Bd. of Embalmers & Funeral Directors*, 168 F. Supp. 753 (S.D. W. Va. 1959) stated that when an appeal to the state courts is given as a part of the administrative remedy, it is proper to require an aggrieved party to prosecute such appeal before bringing an action in a federal court §17, p. 311. *Wiggins v. Eastern Assoc. Coal Corp.*, 357 S.E.2d 745, (1987). *Cornell v. General Elec. Plastics*, 853 F.Supp. 221 (S.D. W. Va. 1994)

issued a no probable cause ruling as a result of their investigation.[4] No hearing was ever held.

After the Petitioner obtained counsel the suit was amended on January 30, 1998 . On April 17, 1998 the EEOC issued another right to sue letter. This complaint was based on the Title VII civil rights issues of religious discrimination and retaliatory discharge relating to the Petitioner's termination from employment in January 1995. The suit was again amended to include these EEOC issues on July 13, 1998. The Petitioner is a member of the Seventh-Day Adventist religious denomination and the retaliation began in 1992 after a ruling was issued by the WV Human Rights Commission finding the Respondent guilty of discrimination and failure to accommodate the Petitioner's daughter and continued through December 1994. The original complaint with the Human Rights Commission was filed by the Petitioner on behalf of her nine year old daughter. The respondents only complied with a small portion of the order in this case.

Petitioner filed a work related request for religious accommodation in October 1992 with the grievance board, the Human Rights Commission and the EEOC. The grievance board dismissed the grievance on July 22, 1993 stating they lacked jurisdiction (Grievance No. 92-01-456). See *record, 4th circuit appeal.* On June 13, 1997 (two years after Petitioner's grievance hearing) the WV Human Rights Commission held a hearing and

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[4] *Wilfong v. Chenoweth Ford, Inc.*, 451 S.E.2d 773, (1994). While the doctrine of res judicata is applicable to the final determinations made by the W. Va. Human Rights Commission after conducting public hearing on the merits of discrimination complaint, it is not applicable to "no probable cause" determination issued by Equal Employment Opportunity Commission from having preclusive effect on subsequent action due to lack of final determination on the merits involving actual litigation, rather than just mere investigation. Also *Jones v. Glenville State College* 433 S.E.2d 49 (W.Va. 1993)

found Respondents guilty of discrimination and failure to accommodate and awarded back pay and damages. This complaint was filed in October of 1992.

The Respondent filed for dismissal of the case before the Northern District Court based on collateral estoppel and res judicata as a result of the grievance procedure. The Northern District Court at Elkins dismissed the case on May 17, 1999. The Petitioner appealed to the Fourth Circuit Court of Appeals on June 14, 1999 (Appeal No. 99-1793) and on October 6, 1999 they issued an unpublished opinion and dismissed Petitioner's complaint. On October 18, 1999 petitioner filed a petition for en banc rehearing and on December 13, 1999 the request was denied.

REASONS FOR GRANTING THE PETITION

I. In applying principles of res judicata and collateral estoppel, the federal courts below should have only given the preclusive effect to the ruling on the employee grievance that the highest court in West Virginia would have given to it.

There are essentially four requirements that must be met before collateral estoppel will apply: [5]

1] Issue decided in previous action is identical to present action. Issue is Title VII issue of 16 religious discrimination and retaliation because of complaints filed with the WV Human Rights Commission and the EEOC. The issue in the grievance involved the School Laws of WV.

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[5] *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354 C.A. 11 (Ga.) 1998; *McNealy v. Caterpillar, Inc.*, 139 F.3d 1113; C.A. 7 (Ill.) 1998. *Kelly v. Armstrong*, 141 F.3d 799; *Haley v. Retsinas*, 138 F.3d 1245; C.A. 8 (MO.) 1998.

2] Issue must have actually been litigated. The Civil rights issues were not litigated in any action and "changes in facts essential to a judgment will render (issue preclusion) inapplicable in a subsequent action raising the same issues." Collateral estoppel is applicable only when no "special circumstances (here the adequacy of state trial procedure) warranted an exception to the normal rules of preclusion.
Montana v. United States, 440 U.S. 147, 159, 99 S.Ct. 970, 59 L Ed. 2d 210 (1979) .[6] EEOC never issued right to sue letters until two years after grievance hearing in 1997/98 and therefore civil rights issues could not have been litigated.[7]

3] Issue must have been determined by valid and final judgment. Civil rights issues were not presented and the judgment never said anything about civil rights issues. Plus the West Virginia Supreme Court stated in *Vest* (Appendix D] that grievance procedures are not res judicata or collateral estoppel to Title VII complaints. The West Virginia Supreme Court of Appeals, Cleckley, J. held that:

> "Civil action filed under the West Virginia Human Rights Act is not precluded by prior grievance decided by the West Virginia Education and State Employees Grievance Board arising out of same facts and circumstances, as issues are not identical, and procedures employed by Board are

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[6] *Glover v. Narick*, 184 W. Va. 381, 400 S.E. 2d 816 (1990) held that "" fundamental due process point concerning the use of collateral estoppel is that any person against whom collateral estoppel is asserted must have had a prior opportunity to litigate his claim.

[7] *Conrad v. AMP, Inc.* (1979, MD NC) 21 CCH EPD ¶30479, 20 BNA FEP Cas 905, dismissal not res judicata when state action occurred 3 years prior to receipt of EEOC right to sue letter. According to the court no court, state or federal, would have had jurisdiction over plaintiff's Title VII claims at the time of the state action.

> not substantially similar to those employed by either court of law or the Human Rights Commission. Code, 5-11-1 et seq." *Vest v. Bd. of Ed. of Nicholas County*, 193 W. Va. 222, 455 S.E. 2d 781 (1995). See Appendix D.

4] Determination must have been essential to prior judgment. The determination was rendered based on the School Laws of WV and not any state or federal civil rights issues.

The principles of res judicata are a final judgment on merits; identity of cause, and identity of parties in both actions. There has never been a judgment on the merits of the Title VII complaint nor any court action, the cause is different in the two actions and the parties in the actions are different because the Title VII action names specific individuals.

The Fourth Circuit failed to recognize these facts. In two prior rulings, the grievance board had stated they lacked jurisdiction on civil rights issues. (Grievance 92-01-456 and Grievance 93-01-154). See Appendix D footnote 3.

Some circuits have found that even if the discrimination issues were presented this would not bar a trial de novo in federal court pursuant to Title VII (42 USCS 2000(e) et seq.)

The Sixth and Seventh Circuit have held that even if a state agency awarded relief to employees alleging unlawful employment practices that decision would not preclude the same employees from bringing a federal court action under Title VII of the Federal Civil Rights Act, seeking additional relief from the same practices. *Cooper v. Philip Morris, Inc.* (1972, CA6 Ky) 464 F2d

9. *Batiste v. Furnco Constr. Corp.* (CA7 Ill) 503 2d 447. (1972, DC Ill) 350 F. Supp. 10.

In *Cook v. Bd. of Ed.*, 671 F. Supp. 1110 (S.D. W. Va. 1987) the Supreme Court WV held "with the source of the law being different, and with the result being markedly different, the court cannot defer to the conclusions of law made by the hearing examiner." *Kirk v. Board of Education* (1987, CA7 Ill) 811 F2d 347, 42 BNA FEP Cas 1473, 42 CCH EPD p. 36787.

28 USCA § 1738 does not allow federal courts to employ own rules of res judicata in determining effect of state judgments; rather it goes beyond common law and commands federal court to accept rules chosen by state from which judgment is taken. *National R. Passenger Corp. v. Pennsylvania Public Utility Com.* (1987, ED Pa) 665 F Supp 402, affd (CA3 Pa) 848 F2d 436, cert den (US) 102 L Ed 2d 220, 109 S. Ct. 231. *Gutierrez v.* Lynch (1987, CA6 Ohio) 826 F2d 1534. *E. D. Systems Corp. v. Southwestern Bell Tel. Co.* (1982, CA5 TX) 674 F2d 453. *Steph v. Scott* (1988, CA5 TX) 840 F3d 267, p. 4(b). *Eisfelder v. Dept. of Natural Resources* (1993, WD Mich) 847 F. Supp. 78, 3 ADD 1057, 3 AD Cas 933. *Rutledge v. Arizona Bd. of Regents* (1988, CA9 Ariz) 859 F2d 732. *Henry v. Farmer City State Bank* (1986, CA7 Ill) 808 F2d 1228, 6 FR Serv 3d 971.

42 USCS 1983, State law controls extent to which state proceeding estops subsequent federal action. *Gregory v. Chehi* (1987, ED Pa) 654 F. Supp. 670; (CA3 Pa) 843 F2d 111.

The *U.S. Supreme Court in 1979* emphasized the need for "a full opportunity to be heard is an essential element of res judicata i.e., the risk of unfairness must be overcome if claim preclusion

and cause of action preclusion is to be allowed. Where the opportunity to litigate was not complete and unfettered, the court should not grant preclusion because fundamental unfairness is existent." The following have rejected doctrines of collateral estoppel and res judicata as bars to litigation in federal courts even where there has been prior state agency adjudication related to same or similar charges. *EEOC v. Peterson, Howell & Heather, Inc.* (1989, DC Md) 702 F. Supp. 1213, 48 BNA FEP Cas 1185, 49 CCH EPD pp. 38684. *Garner v. Giarrusso* (CA5 La) 571 F2d 1330, 20 BNA FEP Cas 1314, 16 CCH EPD p. 8274, reh den (CA5 La), 575 F2d 300. *Cummins v. Parker Seal Co.* (CA6 Ky) 516 F2d 544, Affd 429 US 65, 50 L Ed 2d 223, 97 S. Ct. 342. *Hayes v. Solomon*, 597 F2d 958, 982-85 (5th Cir. 1979) *Unger v. Consolidated Foods Corp.* (1981 CA 7 Ill) 657 F2d 909, 26 BNA FEP Cas 1025, 26 CCH EPD p. 32042. *Cooper v. Philip Morris, Inc.* (1972, CA6 KY) 464 F2d 9.

Where plaintiff decided to prosecute complaint of sex discrimination and consequent wrongful termination from employment at state administrative level with subsequent state judicial review, neither doctrine of election of remedies nor doctrines of res judicata and collateral estoppel foreclosed plaintiff from subsequently pursuing her right to seek trial de novo in federal court pursuant to Title VII . *42 USCS § 2000e et seq. Unger v. Consolidated Foods Corp.* (1981, CA7 Ill) 657 F2d 909, 26 BNA FEP Cas 1025, 26 CCH EPD p. 32042 *(U.S. Supreme Court.)*

Most courts of appeals have cited *Alexander v. Gardner-Denver* and the federal courts "final responsibility" in support of the rule that title VII complainants are entitled to a de novo opportunity to present their cases in federal courts irrespective of the nature of the prior state proceedings. Arbitral fact-finding processes, the Court observed, are not

commensurate with judicial processes, the record is not as complete, the usual rules of evidence do not apply and civil trial procedures such as discovery, compulsory process cross-examination, and testimony under oath are often severely limited or unavailable.

Other courts have held that in addition to the other elements collateral estoppel "there must be a showing that the policies and goals underlying the matter at issue are the same in both proceedings." *Bortz v. Workers Comp. Appeal Board* 656 A2d at 559. All of the basic rules must be satisfied before they will act to deny a person of their rights.

II. In the *Vest* case, the West Virginia Supreme Court decided that final rulings on claims brought through the WV Education and State Employees Grievance Board process would not preclude later civil rights actions based on the same claims.

Finally an important question is whether the Petitioner had a full and fair opportunity to present her case. Obviously she did not. *Vest* states that the grievance procedure in WV does not afford this opportunity. Syllabus 3 states "A civil action filed under the West Virginia Human Rights Act, *W. Va. Code, 5-11-1, et seq.*, is not precluded by a prior grievance decided by the West Virginia Education and State Employees Grievance Board arising out of the same facts and circumstances " Appendix D.

Both *Vest* and the Petitioner were employed by a Bd. of Ed. in West Virginia, both filed a level IV grievance and had a grievance hearing after they were terminated from their employment. *Vest* however did present evidence in support of her discrimination claim but in her post hearing brief,

she relinquished her claim upon her belief that it was not the proper forum to hear her discrimination claim whereas the Petitioner did not present evidence because the discrimination claim was already placed with the WV Human Rights Commission and the EEOC and she felt this was where it belonged. The grievance board denied Vests grievance and *Vest* appealed to the Circuit Court of Kanawha County who affirmed the level IV decision and the WV Supreme Court refused to hear her appeal. Whereas the grievance board reinstated the Petitioner to her job but permitted a suspension to take place during the time of the decision making process. The Respondents initiated the appeal to the Barbour County Circuit Court and thirty days later the Petitioner's representative appealed the suspension portion of the decision only and the Circuit Court reversed the suspension and allowed her to be terminated and the Supreme Court granted her appeal. *Vest* filed a complaint with EEOC after her grievance hearing and the Petitioner filed her complaint with the WV Human Rights Commission and the EEOC prior to her grievance hearing and preserved the EEOC discrimination issues.

In both cases the Board of Education filed a motion for summary judgment with the district court arguing the discrimination claim was barred by the doctrines of res judicata and collateral estoppel because of the plaintiff's previous hearing before the Grievance Board. The Southern District Court turned to the WV Supreme Court for guidance and an opinion on the issue. The Northern District Court ignored the WV Supreme Courts opinion. The fact that the WV Supreme Court chose to hear the Petitioner's case does not make it any different from the *Vest* case and adds little when the same court states the grievance procedure does not allow a full and fair opportunity to be heard and which does not preclude a civil action filed under the

WV Human Rights Act. [2] See Appendix D for full opinion.

In *State ex re. White v. Parsons*, 483 S.E. 3d1 (W. Va. 1996) Michies 1998 Supp., p. 19, Administrative Law the West Virginia Supreme Court stated that "any administrative agency is limited by principles of fundamental fairness." Grievances, according to W. Va.Code, 18-29-2 (1992), may include claims by employees alleging "discrimination" in the application or interpretation of written rules or procedures, "discrimination" in the "application of unwritten policies or practices of the board, [and] any specifically identified incident of harassment, or favoritism[.] This Code also defines the following terms for purposes of article twenty-nine:

"(m) 'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." The word discrimination does not refer to Title VII Civil Rights issues but to the Code as outlined in the above grievance procedure.

A trial by jury is guaranteed by the *Constitution of the United States* and there is never the opportunity or a choice of a trial by jury at any stage of the grievance procedure. Many courts have held that Title VII issues are for jury determination.[8] 12 ALR 5th 508. U.S.C.A. Const.

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[8] *West v. Gibson*, No. 98-238; 527 U.S. ___decided 6/14/99. § 2000e—16[c] "to empower courts to entertain an action by a complainant still aggrieved after final agency action." In 1991, Congress again amended Title VII in the Compensatory Damages Amendment (CDA), which among other things, permits victims of intentional discrimination to recover compensatory damages "[I]n an action...under [§ 2000e—16]." §

Amend. 7 [9] Vest states clearly and simply that res judicata and collateral estoppel does not apply to grievance board decisions in the State of West Virginia. (See Appendix D for full case.)

II. The Fourth Circuit's refusal to follow *Vest* conflicts with the approach to issues of res judicata and collateral estoppel followed in a number of other circuits.

Federal rules regarding collateral estoppel and res judicata have always looked back to the States rules and applied the states rules in these matters. The WV Supreme Court issued its opinion in *Vest* and its principles have been applied in other cases[10] as well. *Vest* states clearly and simply that res judicata and collateral estoppel does not apply to grievance board decisions in the State of West Virginia.(See Appendix D for complete case.) This ruling is in line with ruling that an appealed determination of state human rights commission dismissing charge of employment discrimination does not bar by res judicata plaintiff from bringing

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1981a (a)(1), and adds that any party in such an action may demand a jury trial, § 1981a(c).

[9] *Palermo v. Tension Envelope Corp.* 959 S.W. 2d 825, 13 I.E.R. Cas. (BNA) 1275 (Mo. Ct. App. E.D. 1997), reh'g and/or transfer denied, (Jan. 8, 1998) and transfer denied, (Feb. 24, 1998) stated that "if facts are in dispute as to whether employer's conduct toward employee is discriminatory, question is one for jury for purposes of statute prohibiting employer from discriminating against employee in retaliation for exercising rights under workers compensation law. "

[10] *Asaad v. Res-Care, Inc.*, 197 W.Va. 684, 478 S.E. 2d 357(1996); *Harrison County Bd. of Ed. v. Carson-Leggett*, 466 S.E.2d 447, (1995), not barred by doctrine of res judicata or collateral estoppel from pursuing discrimination claims

subsequent Title VII action in federal court for employment discrimination. *Parker v. Danville Metal Stamping Co.* (1985, CD Ill) 603 F. Supp 182, 37 BNA FEP Cas 250. *Jones v. Glenville State College* 433 S.E.2d 49 (W.Va. 1993)

Some circuits have found that even if the discrimination issues were presented this would not bar a trial de novo in federal court pursuant to Title VII (42 USCS 2000(e) et seq.)[11]

Even if it were considered a court the Federal Court when asked to give res judicata effect to state court judgment must apply res judicata principles of law of the state (here W.Va.) whose decision is set up as bar to further litigation. *Hernandez v.* Lafayette (1983, CA5 La) 699 F2d 734; *Gregory v. Drury* (1987, CA5 Tex) 809 F2d 249; *Henry v. Farmer City State Bank* (1986, CA7 Ill) 808 F2d 1228, 6 FR Serv 3d; *Eisfelder v. Dept. of Natural* Resources (1993, WD Mich) 847 F Supp 78, 3 ADD 1057, 3 AD Cas 933; *United States v Jones* (1993, SD Ala) 837 F Supp 1145.

The Fourth Circuit decision in this case has caused a division of authority and opinion between the Northern District Court of WV in Elkins and Southern District Court of WV who requested that the WV Supreme Court issue a ruling in *Vest* and then adopted the State Court's ruling.

Appellate courts have cited strong Congressional policy that plaintiff not be deprived of right to resort to federal court for

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[11] *Unger v. Consolidated Foods Corp.* (1981 CA 7 Ill) 657 F2d 909, 26 BNA FEP Cas 1025, 26 CCH EPD p. 32042. *Cooper v. Philip Morris, Inc.* (1972, CA6 KY) 464 F2d 9. *Hayes v. Solomon*, 597 F.2d 958, 98285 (5th Cir. 1979)

adjudication of federal claims under Title VII. Some courts have even gone so far to state that Title VII is strictly an issue to be decided by the Federal Courts. The grievance procedure in WV does not allow for any recovery for intentional infliction of emotional and physical distress.[12]

In 1979 the U. S. Supreme Court in *Parklane Hosiery Co. v. Shore*, emphasized the need for a "full opportunity to be heard is an essential element of res judicata, i.e., the risk of unfairness must be overcome if claim preclusion or cause of action preclusion is to be allowed. Where the opportunity to litigate was not complete and unfettered, the court should not grant preclusion because fundamental unfairness is existent."

The U. S. Supreme Court opined that allowing preclusion may be "unfair to a defendant if the judgment relied upon as a basis for the preclusion is itself inconsistent with one or more previous judgments in favor of the defendant." In the instant case the Administrative Law Judge found fault on the part of the Board of Education as a contributing factor and that Petitioner acted in a manner consistent with other employees actions in similar circumstances which of itself indicates disparate treatment towards the Petitioner. *Level IV Grievance Board Decision*

"Preclusion under res judicata or collateral estoppel is overridden if the principle would preclude a federal court, as a consequence of a prior state

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[12] *Mullis v. Mechanics & Farmers Bank*, 994 F. Supp. 680 (M.D.N.C. 1997); *Albert v. National Cash Register Co.* (1995, SD Fla) 874 F. Supp 1328 ; *Taylor v. Metzger*, 152 N.J. 490, 706 A.2d 685, 76 Fair Empl. Prac. Cas. (BNA) 58, 72 Empl. Prac. Dec. (CCH)¶45231 (1998)

court judgment, from adjudicating a claim, defense, claim, defense, facts, or issues implicating federal law."

Rules of Decision Act, *28 USCS 1652*, require Federal Courts to give prior state judgment same res judicata effect as would be provided by courts of that state. *Al-Khazaji v. St. Francis* College (1986 CA2PA) 784 F3d, 505. *44 USCA § 1983*, state law controls extent to which state proceeding estops subsequent federal action; *Gregory v. Chehi* (1987, ED Pa) 654 F Supp. 670; (CA3 Pa 843 F2d 111.) The full faith and credit statute does not permit federal courts to employ own rules of res judicata in determining effects of state judgments; rather, federal court is to accept rules chosen by state in which judgment is rendered. *MGA, Inc. v. General Motors Corp.* (1987, CA FC) 88827 F2d 729, 3 USPQ2d 1762.

In a sex discrimination suit pursuant to *42 U.S.C.A. § 2000e* et seq., in which a female plaintiff alleged that persistent harassment in her job resulted in her unlawful termination of employment, the court held, in *Beck v Mather* (1976, WD Va) 417 F Supp 648, that plaintiff's unsuccessful breach of contract suit in a state court was not res judicata as to claims under *Title VII of the Civil Rights Act of 1964* in federal court. It is well settled, said the court, that a prior state court determination is not res judicata as to Title VII claims, and that a federal court is not bound by the state court's findings of fact [1]

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[13] *West. Secretary of Veterans Affairs v. Gibson*, No. 98-238, (*West v. Gibson* 527 U.S. ___6/14/99. §2000e—16 [c] "to empower courts to entertain an action by a complainant still aggrieved after final agency action." In 1991, Congress again amended Title VII in the Compensatory Damages Amendment (CDA), which among other things, permits victims of intentional discrimination to recover compensatory damages "[i]n an action...under [§2000e—16]," §1981a(a)(1), and adds that any party in such an action may demand a jury trial, §1981a(c).

A recent ruling C.A.D.C. 1998 stated that for administrative determination to have issue-preclusive effect in later judicial proceeding it not only satisfy ordinary requirements of collateral estoppel but must also result from process sufficiently similar to judicial proceeding. Restatement (Second) of Judgments § 83. *Sea-Land Service, Inc. v. Department of Transportation*, 137 F.3d 640, 329 U.S. App. D. C. 108. Also, M.D. Ala. 1998. *See Vest*, Appendix D, grievance board is not similar to court.

Determinations on employment discrimination claims made pursuant to administrative proceedings or contractual grievance processes are not given any preclusive effect, under doctrines like res judicata, in future suits to redress rights under Title VII or § 1981. *42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.*[13] *Smith v. State of Alabama*, 996 F. Supp. 1203. *Stuhlreyer v. Armco, Inc.* (1992, SD Ohio) 849 F. Supp 583, affd (CA6 Ohio) 12 F3d 75. *Civil Rights Act of 1991, §2, 105 Stat. 1071, 42 U.S.C. §1981 note* (congressional finding that "additional remedies under Federal law are needed to deter intentional discrimination in the work- place").

Also recognizing that state law controls applicability of res judicata or collateral estoppel in nondiversity action where prior judgment involved issues of state law are the U. S. Supreme Court; First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits. *Fleming v. Universal-Rundle Corp.*, 142 F.3d 1354 (C.A. 11(Ga.) 1998; *McNealy v. Caterpillar, Inc.*, 139 F. 3d 1113 (C.A. 7 (Ill.) 1998; *Kelly v. Armstrong*, 141 F.3d 799; (C.A. 8 Neb.) 1998; *Haley v. Retsinas*, 138 F. 3d 1245

(C.A. 8 Mo.) 1998; *Settle v. S.W. Rodgers, Co., Inc.*, 998 F. Supp. 657 (E.D.Va. 1998); *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (C.A.4 S.C.) 1998; *Dodd v. Hood River County*, 136 F. 3d 1219, (C.A.9 Or.) 1998; *Thoele v. U.S. Postal Service*, 996 F.Supp. 818 (N.D.Ill. 1998); *Allenfield Associates v. U.S.*, 40 Fed. Cl. 471 1998.

Because of the difficulty of securing appellate review, trial courts will only rarely obtain guidance from the federal courts of appeals on this issue, and the opportunities for this Court to review the issue will be few. This case presents a rare opportunity to assure that an injustice does not occur and that laws of collateral estoppel and res judicata are applied equally.

The decision below, Appendix C, conflicts with other districts within the Fourth Circuit, with other Circuits, with Congressional intent, [7] with the purpose of Title VII to curb discrimination and frustrates the public policy interest against discrimination as set forth in *Brantly v. Pisaro (1996)* 42 California Appeal 4th, *1591, 1601*, with the Constitution and federal policy to see that all persons are accorded access to the courts and have a full and fair opportunity to present their cases to a jury. When you consider that the respondents were found guilty of religious discrimination twice since 1992 plus they were found guilty of reprisal twice under the school laws of West Virginia by the grievance board by two separate hearing - examiners against the Petitioner since 1992 then you find reasonable cause to assume their actions were intentional based on the fact that they had been made aware of their illegal actions in 1992 and they subsequently showed a disregard for the Civil Rights Laws by

doing the same thing again and against the advice of the prosecuting attorney.

The Fourth Circuits decision represents a Federalistic attitude, is against Congressional intent to curb discrimination, against public policy and purpose of Title VII, shows a disregard for the rights of the State of West Virginia, shows a disregard for opinion of the W. Va. Supreme Court in *Vest*, as well as the rights of the Petitioner to have her case heard by the court and causes a division within its own circuit and between the circuits.

The Court should grant certiorari to review these important conflicts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Karen Sue Conner, *Petitioner*
Pro Se
P. O. Box 192
Belington, WV 26250
Phone: (304) 823-2646

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